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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT LEE SMITH,

Defendant and Appellant.

B207654

(Los Angeles County  
Super. Ct. No. GA 071473)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Janice Claire Croft, Judge. Reversed in part with directions and affirmed in part.

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Alan Mason, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Scott Lee Smith of robbery and petty theft. He appeals, contending that the prosecution presented the case to the jury on a legally incorrect theory and that he cannot be convicted of both robbery and the lesser included offense of petty theft on the basis of the same conduct. We reject the first contention but agree with the second, and we therefore reverse in part.

### BACKGROUND

The information charged Smith with one count of robbery in violation of Penal Code section 211<sup>1</sup> (count 1), and one count of petty theft with a prior in violation of section 666 (count 2). As to both counts, it was alleged that Smith personally used a deadly and dangerous weapon in violation of section 12022, subdivision (b)(1). The complaint also alleged that Smith had a prior serious or violent felony conviction within the meaning of section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d), and one serious felony conviction within the meaning of section 667, subdivision (a)(1). Finally, the information alleged that Smith served four prior prison terms within the meaning of section 667.5, subdivision (b). Smith admitted a prior conviction for robbery for purposes of the petty theft with a prior charge.

Smith pleaded not guilty to counts 1 and 2 and denied the special allegations. The jury found Smith guilty on both counts but did not find the deadly weapon enhancement to be true. The court found that Smith suffered the alleged prior convictions within the meaning of sections 667 and 667.5. The court sentenced Smith to the upper term of five years for the robbery conviction and a five-year enhancement pursuant to section 667, subdivision (a). The court stayed imposition of sentence on the petty theft count pursuant to section 654. The court also imposed a \$200 restitution fine (§ 1202.4, subd. (b)) and a \$20 court security fee (§ 1465.8, subd. (a)(1)), and the court imposed but stayed a \$200 parole restitution fine (§ 1202.45). Smith filed a timely notice of appeal.

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<sup>1</sup> All further statutory references are to the Penal Code.

The evidence introduced at trial showed that on October 30, 2007, Candace Torres witnessed Smith enter the Rite Aid where Torres worked as a shift supervisor. She finished ringing up the last customers at her register, closed her line, and then approached Smith, who was standing in the deodorant aisle. She told him that he was not allowed in the store and that he had to leave. Smith had a bottle of “Axe” deodorant spray in his hands. He asked Torres why he had to leave. She explained why and he said “okay” and proceeded toward the front of the store.

Loss prevention officer Robert Chavez testified that he saw Smith place an Axe deodorant canister in his right front pants pocket while walking to the front of the store. Chavez followed Smith outside and approached him, identifying himself as loss prevention security for Rite Aid. Smith then grabbed Chavez by the sweater and pulled him approximately 15 feet to the sidewalk area in front of the store. Torres testified that she saw Smith grab and pull Chavez and that she never saw Chavez grab Smith. Chavez claimed that he felt “frightened” and “concerned” by Smith’s actions.

After Smith let go of Chavez, Chavez said he just wanted the Axe canister back. Smith demanded to know who Chavez was. Chavez responded that he already identified himself to Smith and repeated his request to return the deodorant. While walking toward the street, Smith replied that he did not have anything and pulled out a cell phone from his right pants pocket. Chavez again told Smith to return the deodorant.

Smith then pulled the Axe canister from his pants pocket and threw it down at Chavez’s “left leg area.” The can grazed off Chavez’s foot and rolled into the street. Chavez backed away and was about three to five feet away from Smith when Smith pulled from his back pocket what appeared to Chavez to be a folding knife. Without opening the object, Smith made a “quick punching motion” at Chavez and then turned around and ran toward the back of the store. Chavez recovered the deodorant and returned it to the store.

Chavez identified Smith from a police photo lineup five days later. Officer Heath Harvey went to Smith's residence and in his room found several bottles of Axe deodorant and clothes that matched the description of the suspect in the robbery.

After Harvey advised Smith of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), Smith admitted that he was at the Rite Aid on the night of October 30. Smith told Harvey that the confrontation that Chavez described was fabricated, however, and Smith gave Harvey the following account of the events of that night: While in the store, Smith noticed that the management had "spotted" him, and he thought that he should leave because he did not get along with them. He left the store without purchasing anything and proceeded towards the street when someone grabbed the back of his shirt and told him to go back into the store. Smith continued to walk away, tearing his shirt in the process. (Harvey testified that the brown shirt recovered at Smith's house had no tears in it.) Smith claimed he never turned around and did not know who grabbed him.

## DISCUSSION

### I. Prosecutorial Misconduct

In closing argument, the prosecutor argued to the jury that Smith's waiving of what appeared to be a folding knife at Chavez *after* abandoning the can of deodorant (by throwing it at Chavez) was sufficient to prove the "force or fear" element of the robbery charge. The prosecutor further argued that because "the crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety," any force or fear Smith used—including the waiving of the alleged knife—before reaching a place of relative safety can satisfy the force or fear element.

On appeal, Smith argues that the prosecutor's argument was erroneous as a matter of law because Smith had already permanently surrendered the stolen property (by throwing the can of deodorant at Chavez) before pulling out the alleged knife. Smith contends that his conviction must therefore be reversed, because "the prosecution present[ed] its case to the jury" on a "legally incorrect theory" in violation of *People v.*

*Guiron* (1993) 4 Cal.4th 1116. He also argues that his counsel was ineffective in failing to object to the prosecutor’s legally incorrect arguments.<sup>2</sup>

Smith attempts to frame his “legally incorrect theory” argument as something other than a prosecutorial misconduct argument, but the attempt fails. The Supreme Court has held that *Guiron* error is limited to circumstances in which “the court [as opposed to the prosecution] presented the state’s case to the jury on an erroneous legal theory or theories.” (*People v. Morales* (2001) 25 Cal.4th 34, 43.) Thus, jury instructions that are inherently erroneous or that are not supported by substantial evidence constitute *Guiron* error. (*Id.* at pp. 41-43.) But when the prosecutor, rather than the court, “misstate[s] some law,” “such an error would merely amount to prosecutorial misconduct [citation] during argument, rather than trial and resolution of the case on an improper legal basis.” (*Id.* at p. 43.) Smith does not argue that the jury instructions were erroneous or unsupported by substantial evidence. His argument concerning the prosecutor’s closing argument therefore raises only the issue of prosecutorial misconduct, not *Guiron* error.

“When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court’s attention by a timely objection. Otherwise, no claim is preserved for appeal.” (*Morales, supra*, 25 Cal.4th at pp. 43-44.) Smith did not object to the relevant portions of the prosecutor’s argument “and thus has waived his claim.” (*Id.* at p. 44.)

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<sup>2</sup> Narrowly construed, Smith’s opening brief appears to raise the “submission of the case on a legally incorrect theory” argument only with respect to the prosecutor’s initial argument concerning use of the alleged knife, and the brief appears to raise the ineffective assistance of counsel argument only with respect to the prosecutor’s additional argument concerning reaching a place of relative safety. Both of the prosecutor’s arguments, however, were based on the proposition that the use of the alleged knife could satisfy the force or fear element, and Smith’s criticism of both arguments is the same—he surrendered the can of deodorant before pulling out the alleged knife. We will therefore interpret Smith’s brief broadly as arguing, with respect to both of the prosecutor’s arguments, that they amounted to submission of the case on a legally incorrect theory and that defense counsel was ineffective for failing to object to them.

Accordingly, Smith's second argument is that his trial counsel rendered ineffective assistance by failing to object to the prosecutor's argument. We need not decide whether counsel's conduct was reasonable because we conclude that, reasonable or not, the failure to object was not prejudicial.

Smith's only argument concerning prejudice is that (1) defense counsel argued to the jury that Chavez's testimony that Smith dragged him 15 feet was not credible because Chavez weighed 250 pounds, and (2) if the jury agreed with that argument, it should have acquitted Smith rather than going on to consider Smith's use of the alleged knife. We conclude nonetheless that there is not a reasonable probability that Smith would have obtained a better result if counsel had objected. (*People v. Salcido* (2008) 44 Cal.4th 93, 170 [describing the prejudice component of a claim of ineffective assistance of counsel].) Chavez's testimony that Smith grabbed him was corroborated by testimony from the store manager, Torres, that she saw Smith grab and pull Chavez. Even if the jury did not believe that Smith dragged Chavez across a distance of 15 feet, they had no reason to doubt that Smith grabbed and pulled Chavez, and no reason to believe that Chavez testified truthfully about the use of the alleged knife, on the one hand, but untruthfully about being grabbed and dragged, on the other. It is therefore not reasonably probable that Smith was convicted on the basis of his use of the alleged knife but *not* on the basis of his having grabbed Chavez.<sup>3</sup> For all of these reasons, we conclude that counsel's failure to object to the prosecutor's argument was not prejudicial.

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<sup>3</sup> We note that the jury rejected the allegation that Smith personally used a deadly or dangerous weapon. If the jury's rejection of the allegation was based on a finding that Smith did not wave an object at Chavez after throwing away the deodorant, then defense counsel's failure to object was certainly harmless, because in that case the jury convicted Smith solely on the basis of his having grabbed and dragged Chavez. But if the jury rejected the weapon allegation because it was unable to find beyond a reasonable doubt that the object Smith waved at Chavez was a knife, but the jury *did* find that Smith waved an object at Chavez, then the jury might have adopted the prosecutor's argument and relied on Smith's waving of the object to satisfy the "force or fear" element of the robbery charge. In that case, the analysis in the text would apply—the jury had no reason to believe the testimony about the waving of the object but disbelieve the testimony about the grabbing and dragging, so it would have convicted Smith even if an objection to the prosecutor's argument had been sustained.

## II. Conviction of a Lesser Included Offense

Smith argues that he cannot be convicted of both robbery and the lesser included offense of petty theft on the basis of the same conduct. Respondent concedes that the argument is sound, and we agree. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [a defendant cannot be convicted of both a greater offense and a necessarily included lesser offense on the basis of the same conduct]; *People v. Ortega* (1998) 19 Cal.4th 686, 699 [theft is a necessarily included lesser offense of robbery].) We therefore reverse Smith's conviction on count 2.

## DISPOSITION

Smith's conviction on the charge of petty theft (count 2) is reversed. The judgment is otherwise affirmed. The trial court is directed to prepare an amended abstract of judgment, corrected as stated above, and to forward a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.